STATE OF MICHIGAN

COURT OF APPEALS

KENNETH D. SIMS, Plaintiff-Appellant,	UNPUBLISHED June 28, 2011
v	No. 296664 Saginaw Circuit Court
RITE AID OF MICHIGAN, INC., Defendant-Appellee.	LC No. 09-004489-NO

Before: WHITBECK, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendant. We affirm.

This case arises out of a slip and fall that occurred in defendant's parking lot. Plaintiff exited his vehicle and walked about 10 to 15 feet before slipping and falling on black ice. Plaintiff argues that the trial court erred in granting summary disposition to defendant because defendant had constructive knowledge of the black ice and breached its duty of care owed to plaintiff.

In a premises liability action, a plaintiff must prove that: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached the duty; (3) the defendant's breach of the duty caused the plaintiff's injuries; and (4) the plaintiff suffered damages. *Jones v Enertel, Inc*, 254 Mich App 432, 436-437; 656 NW2d 870 (2002). The duty a landowner owes to those who enter his or her land is determined by the status of the visitor. *Sitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). It is undisputed that plaintiff was an invitee while on defendant's premises.

A defendant owes a duty to exercise reasonable prudence to render its premises reasonably safe for its invitees. *Quinlivan v Great Atlantic & Pacific Tea Co*, 395 Mich 244, 251; 235 NW2d 732 (1975). To comport with this duty, the defendant must take reasonable steps to deal with dangerous, injury-causing conditions on its premises, but only if the defendant knows, or by exercise of reasonable care should discover, the existence of the danger. *Nash v Lewis*, 352 Mich 488, 492; 90 NW2d 480 (1958). The defendant is liable for injuries resulting from an unsafe condition either caused by his own active negligence and that of his employees, or if otherwise caused, were known to the defendant, or is of such a character or has existed a

sufficient length of time that he should have knowledge of it. *Clark v K-Mart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001).

Plaintiff contends that defendant breached its duty to exercise reasonable care to discover the existence of the dangerous black ice. But plaintiff's own deposition testimony belies the claim that reasonable care by defendant would have uncovered the existence of the black ice. Plaintiff testified there was no snow in the area; it was not raining, and the parking lot appeared dry. Plaintiff testified that he was looking down for the 10 to 15 feet of the parking lot which he crossed before the fall, and that the lot was dry. Plaintiff further testified that even when he was on the ground, he was unable to see the ice. Plaintiff testified that the only way he was able to determine there was ice on the ground was from touching it with his fingers after he fell.

Plaintiff now argues that the trial court erred in finding that the black ice was not reasonably discoverable. Plaintiff asserts that black ice is not invisible and that defendant should have been able to detect it upon inspection. Plaintiff, however, is bound by his clear and unequivocal deposition testimony for purposes of a summary disposition motion. *Palazzola v Karmazin Products*, 223 Mich App 141, 155; 565 NW2d 868 (1997). Plaintiff cannot now claim that the black ice was visible and capable of detection after testifying that, even from the ground, the ice was invisible.

Plaintiff also argues that meteorological data shows that the temperature was between 23 and 28 degrees Fahrenheit at the time of the accident; the conditions before the incident were conducive to the formation of black ice, and, according to his expert witness, the ice would have formed about two hours before plaintiff's accident. Plaintiff argues that two hours is sufficient time for defendant to have had constructive notice of the ice. Nevertheless, circumstantial evidence that ice may have formed under the weather conditions of that morning does not give rise to a reasonable inference that defendant had constructive notice of it. See *Altairi v Alhaj*, 235 Mich App 626, 640; 599 NW2d 537 (1999).

We affirm. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ William C. Whitbeck
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly